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Nos. 82-185, 82-246, 82-259.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the Petitioner, Boston Police Patrolmen's Association, Inc.

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Questions Presented.

1. Whether the order of the United States Court of Appeals for the First Circuit, affirming the judgment of the district court, constitutes an impermissible and unjustified intrusion upon a valid state statute (Mass. Gen. Laws c. 31, §§ 33 and 39).

2. Whether the order modifying prior remedial orders could be properly entered absent findings of intentional racial or other discrimination.

3. Whether the order accords constitutionally and legally proscribed preferential treatment based solely upon race and ethnicity.

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Opinions Below.

The consolidated opinion of the Court of Appeals is reported at 679 F.2d 965 (1st Cir. 1982) and appears in the petitions for

writs of certiorari filed by the three petitioners in the instant action. (No. 82-185, Petition of Boston Firefighters Union, Local 718, A1-A26; No. 82-246, Petition of the Boston Police Patrolmen's Association, Inc., 14a-39a; No. 82-259, Petition of Nancy B. Beecher, et al., Appendix A.) The consolidated opinion of the district court is reported at 522 F. Supp. 873 (D. Mass. 1981) and appears in the petitions for writs of certiorari as follows: No. 82-185 at A30-A38; No. 82-246 at 52-13a; No. 82-259, Appendix B.

Prior to the above cited consolidated opinions, the United States Court of Appeals for the First Circuit and the United States District Court for the District of Massachusetts had rendered opinions in several separate cases. These cases are reported at: *Castro* v. *Beecher*, 334 F.Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F. Supp. 655 (D. Mass. 1973); 386 F. Supp. 1281 (D. Mass. 1975); *Boston Chapter NAACP* v. *Beecher*, 371 F. Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); 423 F. Supp. 696 (D. Mass. 1976). The former case is referred to as the "police case" and the latter case as the "fire case" by the Court of Appeals. Prior to their consolidation by the United States District Court on April 6, 1981, the police and fire cases maintained separate identities throughout their histories. (See Joint Appendix: The Fire Cases, 92-51a; The Police Cases, 52a-90a.)

Jurisdiction.

The judgment of the Court of Appeals was entered on May 11, 1982. Petitions for writs of certiorari were filed by *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP, Inc., et al.*, No. 82-185; *Boston Police Patrolmen's Association,*

Inc. v. *Pedro Castro, et al.*, No. 82-246; *Nancy B. Beecher, et al.* v. *Boston Chapter, NAACP, Inc., et al.*, No. 82-259, within ninety days of the May 11, 1982 judgment. The petitions in all three cases were granted on November 1, 1982. The cases were also consolidated by this Court on November 1, 1982. The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved.

Constitution of the United States, Amendment X.

42 U.S.C. §§ 1981, 1983, 1988.

Sections 703(1), 703(b), 703(j), 706(g), Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(j).

Mass. Gen. Laws c. 31, §§ 33 and 39.

Mass. St. 1980, c. 580.

Mass. St. 1982, c. 190.

Statement of the Case.

Introduction.

This case arises from an order entered by the United States District Court for the District of Massachusetts in these consolidated cases on August 7, 1981, and a judgment of the United States Court of Appeals for the First Circuit affirming that order on May 11, 1982.

Nature of the Case.

Your petitioner, Boston Police Patrolmen's Association, Inc., appealed as intervenor-defendant the order of the district

court which restrained and enjoined the defendant Commissioner of Police for the City of Boston from reducing, pursuant to any city program of reductions in force of police personnel because of lack of funds, the percentage of black and Spanish surnamed post-probationary police officers in the City of Boston Police Department below the level of 11.7 percent of all such officers. As grounds for this action, the district court stated, *inter alia*, that:

> if this Court fails to modify the decree, as requested by plaintiff's motions, then a grevious wrong would be produced by the Court's non-action, i.e., a refusal to amend the remedial order would allow the substantive eradication of all progress made by blacks and hispanics in securing public employment as members of either the police or fire departments since 1970. *Castro* v. *Beecher*, 522 F. Supp. 873, 877 (D. Mass. 1981).

The essence of the foregoing ruling required the defendant Commissioner of Police to deviate from the specific provisions of a state civil service seniority statute, Mass. Gen. Laws c. 31, § 39, for the express purpose of maintaining the percentage of minority representation in the Boston Police Department that existed on July 6, 1981.

Prior Proceedings.

This litigation was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police officers. Their claim was that because of racial discrimination in the recruitment and certification procedures utilized by the City of Boston and the Massachusetts Civil Service Commission, they were effectively denied employment

as police officers. The case was tried before Wyzanski, J., who entered a judgment (*Castro* v. *Beecher*, 334 F. Supp. 930 (D. Mass. 1971)) after which an appeal was taken to the First Circuit. The Court of Appeals filed an opinion giving directions for further proceedings (*Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972)).

On remand, the district court approved and entered a consent decree. *Castro* v. *Beecher*, 365 F. Supp. 655 (1973). The consent decree in the appendix to Judge Wyzanski's 1973 opinion contained four sub-sections: "Certifications"; "Future Examination"; "Recruitment"; and "Reporting". These subsections set forth specific obligations of the parties designed to correct violations found in previous examination and certification procedures. *Id.* at 661-662.

On July 7, 1975, the district court approved a consent decree (J.A. 52a-63a) which was entered into by the parties as requested by the court. That decree provided for the establishment of priority certification groups for police applications, for an affirmative action recruitment program for black and hispanic applicants and for procedures for administration and reporting with respect to police entrance examinations. The decree also provided that "[a]s a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community, certification shall be made according to existing Massachusetts law" (J.A. 63a).

The district court entered a supplemental consent decree on July 13, 1976 (J.A. 64a-74a). Again, on July 1, 1979, the district court approved and entered an agreement which provided for the continuing applicability of the method and ratios for certification provided for by the 1975 decree and for further recruitment activity and monitoring of the Civil Service examination concerning the 1978 police entrance examination (J.A. 75a-77a).

On April 6, 1981, plaintiffs moved to modify prior orders of the district court (J.A. 78a). Specifically, an order was sought preserving the current levels of minority officers in the Boston Police Department. The Boston Police Patrolmen's Association was allowed to intervene as a defendant on April 27, 1981 (J.A. 7a).

A stipulation of facts filed with the court on July 30, 1981 (J.A. 79a-89a) and on August 3, 1981 (J.A. 90a) projected, and the district court found, that the July and August reductions in force contemplated by the City, if carried out according to Mass. Gen. Laws c. 31, § 39, would reduce the percentage of black and hispanic sworn personnel in the Police Department to 6.2 percent (J.A. 81a).

Statement of the Facts.

In 1970, 2.3 percent of the 2,804 sworn officers employed by the Boston Police Department were black or hispanic. At the same time, the black and hispanic population of the city was 16.3 percent. On July 6, 1981, the Boston Police Department employed a total of 1,912 sworn officers of whom 224 (11.7 percent) were black or hispanic (J.A. 79a). During this intervening decade, the district court had found that the minority population of Boston had increased to 30 percent. *Castro* v. *Beecher*, 522 F. Supp. 873, 875 (D. Mass. 1981). On or about July 7, 1981, the Boston Police Department commenced a program of reductions in force of uniformed officers due to a "lack of funds."[1] The program was scheduled for completion on

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[1] At the November, 1980 general election, acting under the initiative process of the Constitution of the Commonwealth of Massachusetts, the voters adopted as Chapter 580 of the Acts of 1980 a tax limitation measure commonly known as Proposition 2½. The principal tax limitation feature of

August 18, 1981. The layoffs were to be accomplished in compliance with the seniority provisions of Mass. Gen. Laws. c. 31, § 39.

Against this background of increased minority representation in the police department, in compliance with the consent decrees, massive police layoffs were scheduled, which, absent court intervention, would significantly diminish this level of minority representation. The district court therefore granted the plaintiffs' injunction relief in the form of plaintiff's requested modification.

Summary of Argument.

This case concerns the extension of judicial power to municipal layoffs whereby a valid Massachusetts seniority statute, both neutral and rational in theory and application, was overridden in contravention of several decisions of this Court and courts of appeals in a majority of the circuits

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Mass. St. 1980, c. 580, restricts most cities' or towns' total annual assessments against their real and personal property to 2½ % of the fair cash value of that property. *See generally, Massachusetts Teachers Association* v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1981) 1764, 424 N.E.2d 469. Proposition 2½ had a severe impact on Boston's financial situation.

Subsequent to the court-ordered modification, state legislation significantly improving Boston's financial situation was enacted, Mass. St. 1982, c. 190, enabling the city to rehire the public safety personnel it had previously been forced to terminate. However, the reinstatement of the terminated police officers did not erase the salary losses inflicted by the terminations and the interruption of their employment may defer their eligibility for promotional examinations.

The underlying dispute as to the validity of the district court's preferential layoff system remains and its resolution affects their interests and the interests common to other police officers represented by the Boston Police Patrolmen's Association and it could occur again. There is still substantial interest and injury to warrant relief. *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 123 (1974).

(pp. 10-15). The Massachusetts seniority statute exemplifies a *bona fide* seniority system held valid by this Court even though its application may have an adverse impact on minorities (pp. 13-14). Absent proof that the Massachusetts seniority statute has an intentional discriminatory purpose, no equal protection violation can be made (pp. 14-15).

Although the instant action arises under 42 U.S.C. § 1981, the preferential layoff system established by the district court cannot be justified under this section (pp. 16-17). Section 1981 confers no greater entitlement than does Title VII of the Civil Rights Act of 1964 (p. 17). If the preferential layoff system established in the instant case is invalid under Title VII decisions of this Court, section 1981 would not afford such a system any greater relief (p. 17).

The Massachusetts seniority statute which provides for a "last-hired first-fired" layoff system may be modified to accommodate victims of past discrimination (pp. 17-19). However, the orders of the district court benefit primarily persons who neither challenged nor were harmed by the past discriminatory examination and certification practices (p. 18).

The Massachusetts seniority statute represents a legitimate exercise of state authority entitled to protection by the Tenth Amendment (pp. 19-20). This Court has held in the past that legislation by states in such areas as police and fire prevention was essential to the independent existence of states and thus was an integral element of state sovereignty (p. 20). Absent a finding as to its unconstitutionality, the court of appeals was in error to override a valid state statute dealing with municipal layoff practices (p. 20).

The court of appeals was in error in finding considerable support in the Sixth Circuit opinion of *Brown* v. *Neeb* to justify the preferential layoff system in the instant case (pp. 21-22). In contrast to the factual situation in *Brown*, in

the instant case, the city had made progress towards the consent degree's goals and was not subject to any timetable for completion (p. 22). Furthermore, no finding of intentional discriminatory hiring practices was found in the case at bar, whereas such was the case in *Brown* (p. 22).

In addition, the preferential layoff system approved by the Court of Appeals is an impermissible form of affirmative action which is contrary to the decision of this court in *United Steelworkers* v. *Weber* (pp. 23-25). The court of appeals neglected to balance the appropriate interests — namely a group interest in affirmative action and the individual interest in seniority (p. 24). In the layoff context, effectuating the group interest abrogates existing seniority rights and creates a readily identifiable class of non-minority victims — contrary to other permissible affirmative action plans (p. 25).

The order of the district court also creates a preferential classification without a determination of a constitutional violation (pp. 26-27). The order of the district court creates a racial preference in the layoff context in favor of individuals for whom there has been no proof that these individuals constitutional rights have been violated (pp. 26-27). To give a preference solely on the basis of color is in contravention of the decision of this court in *Regents of University of California* v. *Bakke* (pp. 26-27).

Argument.

I. The Court of Appeals Incorrectly Abrogated a Valid State Statute Which Created a Bona Fide System of Seniority Thereby Approving a Preferential Layoff System to Benefit a Minority Class of Individuals Who are Not Victims of Discrimination.

A. *The Massachusetts Seniority Statute Establishes a Bona Fide Seniority System for Municipal Police and Fire Employees.*

Title VII of the Civil Rights Act of 1964 ("Title VII")[2] forbids neutral employment practices having an adverse impact on minorities and women; this prohibition, however, does not extend to bona fide seniority systems. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). Employers are thus not obliged to modify seniority-based layoff policies.

Employment practices that perpetuate the effects of past discrimination ordinarily violate Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Section 703(h)[3] of Title VII, however, exempts all "*bona fide*" seniority systems from Title VII's prohibitions. In *International Brotherhood of Teamsters*

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[2] 42 U.S.C. § 2000e-17 (1976 & Supp. III, 1979).

[3] Section 703(h) reads in pertinent part:

> Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ..

42 U.S.C. § 2000e-2(h).

v. *United States*, 431 U.S. 324 (1977), this Court held that even though a seniority system may perpetuate the effects of past discrimination, it can be "*bona fide*" within the meaning of section 703(h). Adverse impact alone is insufficient to "outlaw the use of existing seniority lists." *Id.* at 353.

According to *Teamsters*, a seniority system is *bona fide* if: (1) it applies equally to all groups; (2) it is rational and in accordance with industry practice; (3) it did not have its genesis in racial discrimination; and (4) it has been neither negotiated nor maintained for an illegal discriminatory purpose. *Id.* at 355-56; *accord James* v. *Stockham Valves & Fitting Co.*, 559 F.2d 310, 352 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). The common "last-hired, first fired" system exemplifies a seniority structure satisfying the *Teamster's* criteria.[4] Title VII thus does not require abrogation of such systems notwithstanding their disproportionate impact on minorities and women.[5]

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[4] It was apparently this very structure that Congress contemplated when it provided § 703(h) protection. *See, e.g.*, 110 *Cong. Rec.* 7217 (1964) (remarks of Senator Clark) ("If under a 'last-hired, first-fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.").

[5] This principle is now accepted outright under Title VII in a majority of the circuits. *See, e.g., Hameed* v. *International Ass'n of Bridge Workers, Local No. 396*, 637 F.2d 506, 516 n.11 (8th Cir. 1980); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977); *cert. denied*, 436 U.S. 946 (1978); *Chance* v. *Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Jersey Central Power & Light Co.* v. *IBEW Local Unions*, 508 F.2d 687 (3d Cir. 1975), *vacated and remanded sub nom. EEOC* v. *Jersey Central Power & Light Co.*, 425 U.S. 987 (1976), *on remand*, 542 F.2d 8 (3d Cir. 1976); *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). The rule has been extended to protect systems from attack under 42 U.S.C. § 1981 (1976), *see, e.g., Pettway*, 576 F.2d at 1191 n.37; *Johnson*, 575 F.2d at 474, and Executive Order 11,246, 3

Mass. Gen. Laws c. 31, § 33, sets out in explicit terms the manner in which a civil service employee's seniority is determined. In pertinent part, § 33 provides:

> Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the departmental unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment . . ..

Section 39 of Chapter 31 provides that:

> If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the

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C.F.R. 339 (1965), *see, e.g., United States* v. *Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); *United States* v. *East Texas Motor Freight Systems, Inc.*, 564 F.2d 179 (5th Cir. 1977).

longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the five-year period following the date of such separation.

It is respectfully submitted that the foregoing sections of c. 31 of the Massachusetts General Laws constitute a neutral and *bona fide* system of seniority. As such, these sections seem to be clearly constitutional within the framework of the *Teamsters* decision. The seniority system of c. 31, especially as it relates to separation from employment in § 39, similarly clearly does not have its genesis in racial discrimination, nor has there ever been any suggestion to this effect. It applies equally to all racial groups and ethnic groups and to the extent that it "locks" individuals into jobs, it does so for all without reference to skin color or origin. *See, Myers* v. *Gilman Paper Co.*, 544 F.2d 837 (5th Cir.), *rev'd in part* (in light of *Teamsters*), 556 F.2d 758 (5th Cir.), *cert. dismissed sub nom. Local 741, International Brotherhood of Electrical Workers, AFL-CIO* v. *Myers*, 434 U.S. 801 (1977); *Sabala* v. *Western Gillette*, 516 F.2d 1251 (5th Cir. 1975); *vacated and remanded*, 431 U.S. 951 (1977), *remanded to lower court*, 559 F.2d 282 (5th Cir. 1977).

B. *Absent a Finding of Purposeful Discrimination, the Massachusetts Seniority Statute is Not Invalid Because it May Have a Racially Disproportionate Impact.*

In the case at bar, the officers separated from employment were so separated under the application of a so-called "last-hired, first-fired" section of the statute. The separations were

made solely on the status of the officers and not because of their race. While it is true that separation from service according to § 39 of c. 31 would involve a disproportionate impact upon plaintiffs, that fact alone is not sufficient to require the abrogation of a state statute. *Teamsters*, *supra* at 352. *Teamsters* was reaffirmed by this Court in *TWA* v. *Hardison*, 432 U.S. 63, 83 (1977), and § 703(h) protection was extended to non-length-of-service elements of seniority systems in *California Brewers Ass'n.* v. *Bryant*, 444 U.S. 598 (1980) (plurality opinion). Most recently, this Court held that § 703(h) applies to *bona fide* seniority systems adopted after the effective date of Title VII. Thus, plaintiffs attacking any *bona fide* seniority system, under § 703(h), must prove intent to discriminate. *American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534 (1982). *See also*, *Pullman-Standard Division of Pullman, Inc.* v. *Swint*, 102 S.Ct. 1781, and *Ford Motor Co.* v. *EEOC*, 102 S.Ct. 3057 (1982).

In this case, there has never been any allegation or finding of intentional discrimination. Without exception, every decision rendered in the police case has found that, to the extent discrimination occurred, that discrimination was *unintentional*. *See, e.g.*, *Castro* v. *Beecher*, 334 F. Supp. 930, 934, 944, 948 (D. Mass. 1971); *Castro* v. *Beecher*, 459 F.2d 725, 727 (1st Cir. 1972).

In *Washington* v. *Davis*, 426 U.S. 229 (1976) this Court held in part that a law is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a discriminatory purpose. More specifically, this Court noted at 245 that:

> Both before and after *Palmer* v. *Thompson*, however, various Courts of Appeal have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice

> standing alone and without regard to discrimination purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; *but with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purposes is unnecessary in making out an equal protection violation we are in disagreement.* (Emphasis added.)

This Court specifically cited *Castro* v. *Beecher* as a case wrongly decided. *Washington* v. *Davis*, 426 U.S. at 244 n.12. Despite this express disapproval, the Court of Appeals justified the scope of the district court's order by reference to the violations found in the original suits. *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 974. The court stated that the "independent [constitutional] violations" found in the original suits distinguished the cases from related Title VII decisional law and characterized the "basic issue at stake" in the cases as "the power of a court in a *litigated discrimination case* to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Id.* Reliance on the original erroneous conclusions to supersede a valid seniority statute only compounds the lower court's original mistakes. The district court's power must be circumscribed by the disfavored legal underpinnings of its original decisions. The lower court's reliance on "violations" which rested on discredited legal grounds contravenes the principles of *Washington* v. *Davis* and therefore warrants reversal by this Court.

C. *An Action Brought Under 42 U.S.C. § 1981 Can Not Justify a Preferential Layoff System Which Would be Disallowed Under Title VII Litigation.*

The decisional law discussed to this point was Title VII litigation and this action proceeded under 42 U.S.C. §§ 1981 and 1983. This Court has yet to address the relationships between §§ 703(h) or 703(j) and § 1981 explicitly.[6] This case presents seniority issues within the framework of federal-state relations. Your petitioner respectfully submits that the order of the district court can not be supported by 42 U.S.C. § 1981.

Although the Court of Appeals stated that the "independent [constitutional] violations" found in the original suits distinguished this case from related Title VII cases and characterized the "basic issue at stake" in the cases as "the power of the court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority based layoffs." *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 974, no intentional discriminatory purpose in the application of the Massachusetts seniority statute was found as required by *Washington* v. *Davis* to maintain an equal protection action under § 1983. 426 U.S. 229 at 238-245 (1976). Since its inception in 1970, the case at bar has concerned itself exclusively with instances of unintentional discrimination, therefore no violation of § 1981 could occur. *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 974; *General Building Contractors Association, Inc.* v. *Pennsylvania*, ____ U.S. ____, 102 S.Ct. 3141 (1982).

It is illogical to imply that § 1981 can justify the preferential layoff system mandated by the Court of Appeals if such a system could not survive a review under Title VII. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 583 n.24 (1979),

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[6] See Discussion, Argument III, on *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979) at pp. 23-25, *infra*.

implies that § 1981 confers no greater entitlements than does Title VII and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975) describes the remedies under both statutes as coextensive. This coextension of remedies is required by 42 U.S.C. § 1988 which directs that "jurisdiction [in § 1981 litigation] . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect . . .." *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-5 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *accord*, *Chance* v. *Board of Examiners & Board of Education*, 534 F.2d at 998 and *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d at 1320 n.4; *contra*, *Bolden* v. *Penn State Police*, 578 F.2d 912, 920-21 (3rd Cir. 1978).

D. *The Plaintiffs in the Instant Action are Not Victims of Past Discriminatory Practices to Justify the Preferential Layoff System Approved by the Court of Appeals.*

In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), this Court ruled in favor of constructive seniority for identified victims of racially discriminatory hiring practices. However, this Court indicated that the disputed seniority system, although responsible for locking minorities into lower paid positions, was not the source of discrimination. Therefore, the victims of past discrimination were limited to an award of constructive seniority to the date of their individual employment applications. *Id.* at 757-70. This Court recognized the incompleteness of this remedy, because "most discriminatees even under an award of constructive seniority status will still remain subordinated in the hierarchy to a position inferior to that of a greater total number of employees than would have been the case in the absence of discrimina-

tion." *Id.* at 776-77. Nevertheless, this Court was inclined to balance the rights of discriminatees against the legitimate expectations of non-minority workers who had achieved job status under the existing seniority plan. *Id.* at 777.

Thus, under *Franks*, an employer may award retroactive seniority to individual victims of employment discrimination, even though such an award discriminates against non-minority workers. Such relief is justified because it furthers the "central 'make-whole' objective" of Title VII. *Id.* at 778-79.

It is submitted that on the basis of the *Franks* decision, the Massachusetts seniority statute which provided for a "last-hired first-fired" layoff system may be modified to accommodate victims of past discrimination. Notwithstanding the foregoing, the district court's orders have failed to comply with the principles of *Franks*. The district court's orders benefit primarily persons who neither challenged nor were harmed by past acts of discrimination. *See Boston Chapter, NAACP* v. *Beecher*, 679 F.2d at 976 and 976 n.14. The district court conducted no hearings to identify which of the police and firemen scheduled for layoff had been victimized by the past discriminatory examination and certification practices. Indeed the fact that the relief protects individuals most recently hired ensures that few, if any, members of the original class will benefit from the remedial orders. *See id.* at 976.

In the absence of proof of discrimination as to each individual minority officer, class-wide relief is improper. Under the circumstances, the lower courts lacked the authority to insulate persons not victimized by discrimination from the effects of the seniority system. The court's power to "preserve relief" was properly limited to insuring that the victims of discrimination retained their rightful place in the seniority system, protected from discharge under the "last-hired, first-

fired" layoff system. *See Franks* v. *Bowman Transportation*, 424 U.S. 747, 762-770 (1975).

In *Franks*, this Court did not adopt a "freedom now" theory of retroactive seniority. This Court did not grant seniority credits to minorities by virtue of race or national origin. Rather, this Court allowed retroactive seniority for victims of discrimination because and to the extent that they were victims. Indeed, this Court has recently acknowledged the "overriding importance" of seniority interests. *American Tobacco Co.* v. *Patterson*, 102 S.Ct. 1534, 1541 (1982) (citing *Humphrey* v. *Moore*, 375 U.S. 335, 346 (1964). Emphasizing the strength of these expectations, the Second Circuit has refused to extend quota relief to the layoff context. *See Chance* v. *Board of Examiners*, 534 F.2d 993, 998-99 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). The effect on a small number of readily identifiable non-minority workers was too harsh to justify layoff protection based on race alone. *Id.*

In summary, the lower court's orders contravened relevant precedents of this Court and, accordingly, warrants reversal.

E. *The Court of Appeals was in Error to Supersede the Massachusetts State Statute Absent a Finding as to its Un-Constitutionality Since the Statute Represents a Legitimate Exercise of State Authority Protected by the Tenth Amendment.*

The Tenth Amendment to the United States Constitution states, in relevant part: "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to its people." Thus, powers not delegated to the federal government either expressly or as incidental or implied powers are reserved to the states. *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1942). This Court in *National League of Cities* v. *Usery*,

426 U.S. 833 (1976), applied the Tenth Amendment as an affirmative limitation upon federal authority to enact legislation which directly impairs state autonomy in areas of government traditionally reserved to the states. In *Usery* this Court declared that by imposing wage and hour regulations upon states as employers, Congress had interfered with the ability of the states to make decisions affecting essential state functions. *Id.* at 851-52. This Court stated that authority "to structure employer — employee relationships in such areas as fire prevention, police protection was essential to the "independent existence" of states and thus was an integral element of state sovereignty. *Id. Accord, Federal Energy Regulatory Commission* v. *Mississippi*, ____ U.S. ____, 102 S.Ct. 2126, 2143 n.32 (1982).

The seniority principle contained in Mass. Gen. Laws c. 31, § 39, represents a legislative exercise of traditional state authority. Moreover, in the context of this case, application of § 39 represents the identical function — regulation of employment in public safety positions — found by the *Usery* court to be essential to a state's "independent existence."

Under these circumstances, *Usery* counsels that a federal court should not interfere, by "modification" of prior order, with an essential state function absent a finding that the applicable state law is unconstitutional. The decisions of the lower courts in this case, superseding a valid state statute, contravene rights reserved to the Commonwealth of Massachusetts by the Tenth Amendment. Here the provisions of a presumptively valid state statute have been set aside notwithstanding the fact that no direct challenge to the statute was ever mounted. The justification for past action is the remedial authority of the court, *i.e.*, its ability to implement an eleven-year-old decision which this Court has already described as erroneous. Such action necessarily enervates the Tenth Amendment and its underlying doctrines.

II. The Court of Appeals Incorrectly Applied the Sixth Circuit Court of Appeals Decision, *Brown* v. *Neeb* to the Instant Case.

The Court of Appeals cites the Sixth Circuit opinion in *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981), as the "only circuit case directly on point" 679 F.2d at 978. Since the Sixth Circuit in *Brown* allowed a modification of a consent decree involving the Toledo Fire Department to effectuate a preferential layoff system for minorities, the Court of Appeals reasoned that similar treatment was justified in the instant case. The Court of Appeals was in error in finding "considerable support" 679 F.2d at 972 in *Brown* to justify the orders of the district court.

The factual situation in *Brown* is clearly distinguishable from the case at bar. In *Brown*, the Sixth Circuit affirmed a lower court decision enjoining the City of Toledo from laying off its firefighters on the basis of seniority. Toledo had entered into a consent decree requiring the implementation of an affirmative action plan with a five-year timetable and percentage goals. Despite the plan, the city had made only marginal progress after seven years. Layoffs threatened further to retard that progress. To ease the problem, the district court enjoined the city from implementing a layoff plan that would have decreased minority representation. 644 F.2d 551 at 554-557. The Court of Appeals agreed, holding that although the consent decree did not mention layoffs, the district court could proscribe layoffs by seniority. *Id.* at 563, 565.

The true majority opinion in *Brown*[7] was concerned by the city's failure to achieve the consent decree's goals.

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[7] Although Judge Keith delivered the court's judgment and an opinion, his opinion is not the majority opinion of the Sixth Circuit and is misleadingly reported as such in West's Federal Reporter, thereby causing the First Circuit to erroneously assume that the majority opinion of the Sixth Circuit held that

In the instant case, the minority representation on the Boston Police and Fire Departments increased significantly since the time of the first consent decree in 1973. Furthermore, no timetable nor any percentage goal was established with respect to the implementation of an affirmative action program. Finally, the city in the instant case could demonstrate economic necessity for the layoffs as the result of "Proposition 2½." See discussion, *infra*, at n.1.

The Sixth Circuit's opinion in *Youngblood* v. *Dalzell*, 568 F.2d 506 (6th Cir. 1978) (per curiam) has a more analagous factual situation to the instant case than *Brown*. In Youngblood, the sixth circuit held that layoffs by seniority may not be enjoined where the City of Cincinnati made progress in satisfying the terms of the consent decree. In addition, a review of the consent decree in *Youngblood* reveals that the city denied any intentional discrimination in its *recruitment*, *testing*, *selection* and *hiring* of fire recruits but rather only conceded that some of its past practices could give rise to an inference of discrimination. 568 F.2d at 507. It is submitted that a review of the consent decrees in the instant case would at best give rise to the same inferences found in *Youngblood*.

In sum, based on the factual record before the Court of Appeals, it was error for the court to grant the relief given in *Brown*. Since significant progress had been made with respect to minority representation in Boston police and Fire departments, and since no record of intentional discrimination existed

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an Ohio seniority statute may be superseded. The majority opinion of the Court (Judge Brown and Judge Wiseman) held that the proposed layoffs would violate an Ohio seniority statute. 644 F.2d at 565-66. For further discussion of this subject, see "*Alternatives to Seniority-Based Layoffs; Reconciling Teamsters, Weber* and *The Goal of Equal Employment Opportunity*, 15 University of Michigan Journal of Law Reform, 523, 535 n.76 (1982).

in the case at bar, the plaintiffs should have been denied relief in accordance with *Youngblood*.

III. The Preferential Layoff System Approved by the Court of Appeals is an Impermissible Form of Affirmative Action and is Contrary to the Decision of This Court in *United Steelworkers of America* v. *Weber*.

The Court of Appeals cites *United Steelworkers of America* v. *Weber*, 443 U.S. 193, *rehearing denied*, 444 U.S. 889 (1980) as support for the preferential layoff system established by the orders of the district court. 679 F.2d at 976. The reliance by the Court of Appeals on *Weber* is error.

In *Weber*, this Court focused on voluntary preferences in the employment context. This Court permitted Kaiser Aluminum to adopt voluntarily a preferential training and promotion program. This Court warned, however, that not every plan would be permissible under Title VII. *Id.* at 208. This Court upheld Kaiser's plan on the ground that Title VII permits some voluntary efforts designed to eliminate traditionally segregated jobs. *Id.* at 208-09.

Group remedial efforts appear to be incompatible with Title VII's focus on the individual.[8] This Court in *Weber*,

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[8] Title VII strictures present an absolute "congressional command that each employee be free from discriminatory practices." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Title VII proscribes employment discrimination against *individual* members of protected classes. *See, Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708 (1978) (involving sex discrimination); *see also Civil Rights Act of 1964*, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1976) ("It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ."). Moreover, Title VII protects white employees as well as nonwhites. *See McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

though, felt that such efforts are permissible if they balance the group interest in affirmative action against the individual nonminority worker's expectations of nondiscriminatory treatment. Such a balancing approach is implicit in this Court's description of Kaiser's plan. 443 U.S. at 207-09. Any group remedial plan must attempt to accommodate both sets of goals to the extent possible. Thus, in seeking remedial responses to racial disparities in their work forces, employers must adopt a balancing approach. *See, International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 at 375.

In pursuing this approach, this Court noted five key elements in Kaiser's program. Kaiser's plan was voluntary and had been collectively bargained. More significantly, this Court found that it did not unnecessarily trammel nonminority interests, bar advancement of non-minorities on account of race, replace non-minorities with minorities on account of race, or maintain percentages of representation. 443 U.S. at 208. Although *Weber* did not explicitly depict any of these factors as determinative of a plan's validity, this Court did find all of them to be present in sustaining Kaiser's plan. It seems likely that while the absence of any single factor is not necessarily fatal to a voluntary plan, the absence of several indicates an impermissible remedial program.

The preferential layoff system mandated by the Court of Appeals in the instant case does not comply with the *Weber* safeguards. It fails to accommodate group and individual interests. There is no group interest in competitive seniority. In the instant case, it is a right established by Massachusetts statute that accrues to individual public safety officers as they join their respective departments. Therefore, the appropriate interests are the group interest in affirmative action and the individual interest in seniority. In the layoff context, effectuating the group interest abrogates existing seniority rights

and creates a readily identifiable class of non-minority victims — contrary to other permissible affirmative action plans.

In *Weber*, the preferential voluntary training program was not designed to defeat existing seniority rights. A preferential layoff plan in contrast would involve abrogating existing seniority rights and is distinguishable from *Weber*, *id.* at 215 (Blackmun, J., concurring).

The preferential layoff system directly replaces non-minority employees with minority workers of lower seniority status on the basis of race. Overt displacement of this nature contrasts sharply with the training program upheld in *Weber* where "no whites were fired, laid off, or demoted to make room for black workers." Edwards, Affirmative Action or Reverse Discrimination: The Head and The Tail of Weber, 13 Creighton L. Rev. 713, 758 (1980).

The preferential layoff system also aims to maintain percentages of minorities during a layoff period, despite *Weber's* prohibition of the same. In *Weber*, this Court reviewed Title VII legislative history which clearly indicated that all preferential treatment is forbidden including the maintaining of existing percentage goals. *Weber*, 443 U.S. at 207 n.7 and 216 Blackmun, J., concurring.

Based on the foregoing, the Court of Appeals reliance on *Weber* is in error and, therefore, warrants reversal by this Court.

IV. The Order of the District Court Creates a Preferential Classification Without a Judicial Determination of a Constitutional Violation.

In *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), this Court said that:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the dictum of equality. All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

In the case at bar, the order rendered by the court below clearly draws a distinction between black police officers and white police officers. It creates a preference for black officers in the area of job rentention and it creates this preference without an initial judicial determination that a constitutional violation has occurred.

In *Bakke, supra*, the Regents of the University of California contended, *inter alia*, that this Court had on several prior occasions approved preferential racial classifications without an initial judicial determination of a constitutional violation. Specifically, the University of California pointed to cases involving school desegregation, employment discrimination and sex discrimination. In response to that argument, this Court asserted that the school cases of *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *McDaniel* v. *Barresi*, 402 U.S. 39 (1979) and *Green* v. *County School Board*, 391 U.S. 430 (1968) approved racial classifications which were designed as remedies for the vindication of *constitutional entitlement* (emphasis added). Indeed, the Court noted that in those cases the remedy was not permitted to "exceed the extent of the *violations*" (emphasis added).

With respect to the employment discrimination cases, this Court reached similar conclusions noting that in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) a retro-

designed as remedies for the vindication of *constitutional entitlement* (emphasis added). Indeed, the Court noted that in those cases the remedy was not permitted to "exceed the extent of the *violations*" (emphasis added).

With respect to the employment discrimination cases, this Court reached similar conclusions noting that in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) a retroactive award of seniority to a class of Negro truck drivers was approved because the particular class had been the victims of discrimination. This Court specifically stated that it was necessary to make the victims whole because of the unlawful discrimination practiced against them. *See also*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

In addition, this Court in *Bakke* also observed that courts of appeal have created and approved various types of racial preferences "as remedies for constitutional or statutory violations resulting in identified race-based injuries to individuals held entitled to the preference." *See Bridgeport Guardians, Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973) and *Carter* v. *Gallagher*, 452 F.2d 314 (8th Cir. 1972).

Having disposed of the arguments offered by the University, this Court added: "But we have never approved preferential classification in the absence of proved constitutional or statutory violations." *Bakke, supra* at 302.

Thus, there seems to be little or no doubt that before a court may create a racial preference, there must first be a judicial determination that the constitutional rights of the person or persons to whose favor the preference is created, have been violated.

In the case at bar, there has been no such determination of a constitutional violation of the rights of the plaintiffs and yet plaintiffs have been given a preference, solely on the basis of color by the court below.

Conclusion.

The extension of federal judicial power in this case to municipal layoffs, whereby a valid Massachusetts seniority statute, both neutral and rational in theory and application, was overridden in contravention of several decisions of this Court wherein significant protection was given to bona fide seniority systems. Petitioner respectfully urges this Court to reverse the court below and to remand this case for appropriate relief consistent with your opinion.

Respectfully submitted,

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